No. 14758

United States Court of Appeals

For the Ninth Circuit

RICHARD T. HAWLEY, *Appellant,*

vs.

ALASKA STEAMSHIP COMPANY, a corporation, *Appellee.*

UPON APPEAL FROM THE DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

APPELLANT'S PETITION FOR REHEARING

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The petitioner, on the grounds following, respectfully petitions for a rehearing of this court's judgment, dated the 3rd day of August, 1956.

1. *Sufficient evidence existed under Supreme Court's latest ruling.* The decision in *Schulz v. Pennsylvania R. Co.,* U.S. Supreme Court Docket No. 282, October Term, 1955, 100 L.ed. (Advance p. 430), which was announced on April 9, 1956, subsequent to the argument of this case, clearly demonstrates that the evidence herein was sufficient to go to the jury.

The *Schulz* case involved a Jones Act suit by the widow of a tugboat fireman, who had drowned without witnesses while tending some barges. There was no evidence as to how the deceased had fallen into the water or from where he fell. There was evidence that the decks of the barges were icy in spots and that the deceased had to depend upon a flashlight for illumination.

The District Court directed a verdict for the defendant, stating: "There is some evidence of negligence, and there is an accidental death. But there is no shred of evidence connecting the two." The Court of Appeals for the Second Circuit affirmed saying that the evidence failed to show "where the accident occurred," or "that it was proximately caused by any default on the part of the defendant."

The Supreme Court reversed, pointing out that the petitioner was entitled to recover if the death resulted "in whole or in part" from defendant's negligence. It said that fair-minded men could certainly find from the facts that defendant was negligent in requiring the deceased to work on the dark, icy and undermanned boats; and that the finding of the drowned body, still gripping a flashlight, would support a finding that the deceased had slipped from an unlighted tug as he groped about in the darkness, attempting to perform his duties.

The court stated in the strongest terms that:

> "Issues of negligence, therefore, call for the exercise of common sense and sound judgment under the circumstances of particular cases. We think these are questions for the jury to determine. We see no reason, so long as the jury system is the law of the land, and the jury is made the tribunal to decide disputed questions of fact, why it should not decide such questions as these, as well as others. . . . The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable. Fact finding does not require mathematical certainty. (*Supra,* p. 432-433)."

The evidence in the case before this court is far more

definite, certain and compelling than that in the *Schulz* case, both in regard to negligence and proximate cause. The jury must be given the question of whether the pallet board was negligently swung counterclockwise, and whether that proximately caused the appellant's injury.

2. *The Seville Case is inapplicable. Seville v. United States,* 9 Cir., 1947, 163 F.2d 296, which was cited as a parallel to this case, does not apply, since it was tried to a court without a jury. This court needed only to find there that the evidence did not preponderate against the trial court's decision. Here, the court must determine whether reasonable minds, based upon the evidence and all reasonable inferences, could differ as to the existence of negligence and proximate cause.

3. *Facts in the record were overlooked.* The court found that: "At the time of the impact, by a short backward movement in the space behind him, he could have avoided contact with the board" (Page 6 of the Judgment). This finding overlooked the following questions and answers in the record:

> "Q. Why didn't you step back further before it hit you?
>
> A. I would have got the full load right in my whole stomach.
>
> Q. Why didn't you step back into the space alongside this case of salmon?
>
> A. I would have got hit anyway, because I couldn't move left or right.
>
> Q. It didn't pin you against the salmon?
>
> A. It knocked me against it.
>
> Q. It didn't pin you against the salmon?

A. But if it did, it would have pinned me, and maybe killed me.

Q. Did you let go of the bridle when you were hit?

A. I didn't let go until after I was hit, and then grabbed the ladder; but if I had let go of the bridle —

Q. (Interposing) I am not asking you that.

THE COURT: Just a moment. Let him finish.

MR. HOLLAND: All right.

A. (Continuing) If I stepped back, the whole load would have hit me and maybe killed me at that time." (R. 161)

This testimony was sufficient, if believed by the jury, to establish that appellant could not have escaped by stepping backward and that the swinging of the pallet board was the proximate cause of the injury.

Although there was conflicting or vague evidence as to how the pallet was swung, this did not justify taking the issue from the jury. It was also for the jury to decide from the conflicting evidence whether it was immaterial which way the pallet swung. As the fact-weigher, the jury should determine if the witness, Perry's, opinion was correct, or if the direction of the swing was material since, had the board been swung clockwise, the corner which the appellant was holding would have swung away from him and there would be no immediate danger from the other corner, which was the length of the pallet board away from the appellant.

WHEREFORE, petitioner respectfully prays that a rehearing be granted and that the judgment of this court

be vacated and modified in accordance with the provisions of law and the facts set forth herein.

Respectfully submitted,

KANE & SPELLMAN,
Attorneys for Appellant-Petitioner.

CERTIFICATE

The foregoing petition for rehearing is in the judgment of counsel well-founded and meritorious, and is not interposed for delay.

KANE & SPELLMAN,
JOSEPH S. KANE
JOHN D. SPELLMAN
Attorneys for Appellant-Petitioner.